BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

In the Matter of	**)**	
	)	
Petition for Arbitration of	**)**	
XO MISSOURI, INC.	**)**	
Of an Amendment to an Interconnection	**)**	**CASE NO. LO-2004-0575**
Agreement with SOUTHWESTERN BELL	**)**	
TELEPHONE, L.P., D/B/A SBC MISSOURI	**)**	
Pursuant to Section 252(b) of the	**)**	
Communications Act of 1934, as	**)**	
Amended.	**)**	

MOTION OF XO MISSOURI
TO DISMISS ARBITRATION ISSUES AND STRIKE
RELATED CONTRACT LANGUAGE PROPOSED BY SBC

Pursuant to Rule 4 CSR 240-2.080 of the Missouri Public Service Commission ("Commission"), XO Missouri, Inc. ("XO") respectfully submits this Motion to Dismiss certain issues and strike related contract language proposed by SBC in its Answer to the XO Petition for Arbitration.[1] This Motion is separate and apart from XO's substantive response to the Response of SBC to XO's Petition for Arbitration. XO is concurrently filing its Reply memorandum, along with a revised matrix of issues. That Reply memorandum will substantively address all issues raised by SBC, including the issues that are subject to this motion to strike, but should not be considered a waiver of the arguments set forth herein.

I. INTRODUCTION

1. XO and SBC have an M2A Interconnection Agreement ("M2A"), which became effective upon adoption thereof by XO on July 25, 2001 and is currently effective. Following the effective date of the Federal Communications Commission's ("FCC") Triennial Review Order

[1] XO filed a Motion for Extension of Time on June 7, 2004.

("TRO"),[2] the parties agreed to negotiate "conforming changes" to the XO/SBC M2A in order to implement the requirements of the TRO.[3] Despite the limited scope of the parties' requested but unsuccessful negotiations and this ensuing arbitration, SBC has raised new issues in its Answer that would make changes to the agreement that are not required to conform the XO/SBC M2A to the TRO and are not ripe for arbitration. XO, therefore, respectfully requests that the Commission dismiss SBC-Issues 1, 2, 19, 20, and 21 and strike all related language in SBC's proposed amendment that refers to "Lawful UNEs," and/or "declassified" UNEs or facilities on the grounds that these issues[4] and the associated proposed language are not within the proper subject matter of this arbitration.

II. ARGUMENT

A. Several of SBC's Proposed Arbitration Issues Would Implement Changes to the Agreement that are Not Required by the TRO and Are Beyond the Scope of this Arbitration.

2. The scope of compulsory arbitration under Section 252 of the Federal Telecommunications Act is limited to issues that were the subject of voluntary negotiations between the parties. For instance, in *Coserv Limited Liability Corp. v. Southwestern Bell Telephone Co.*, the Fifth Circuit held:

> The jurisdiction of the PUC as arbitrator is not limited by the terms of § 251(b) and (c); instead, it is limited by the actions of the

[2] Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Report and Order and Further Notice Rulemaking (released August 21, 2003) ("TRO").

[3] The letters documenting this agreement are attached to XO's Reply in Opposition to SBC Motion to Dismiss filed on May 21, 2004.

[4] SBC refers to "Lawful UNEs" and "declassified" UNEs or facilities in association with contract language that it proposes under SBC Issues 1, 2, 19, 20, and 21, but also in reference to other issues including those issues that XO has raised. To the extent that SBC proposes language relating to "Lawful UNEs" and "declassified" UNEs or facilities throughout its proposed amendment, XO also requests that the Commission strike this language from the SBC proposed amendment as not within the proper scope of this proceeding.

> parties in conducting voluntary negotiations. It may arbitrate only issues that were the subject of voluntary negotiations. The party petitioning for arbitration may not use the compulsory arbitration provision to obtain arbitration of issues that were not the subject of negotiations.[5]

In the present case, the subject of the requested negotiations between XO and SBC was limited to the "negotiation of an amendment to implement certain changes in law brought about by the TRO."[6] Thus, only changes necessary to implement the TRO are properly within the scope of this arbitration.

3. SBC, however, is attempting to use this arbitration to make changes to the XO/SBC M2A that are not necessary to implement the TRO and in fact are contrary to the requirements of the TRO. In SBC-Issues 1, 2, 19, 20, and 21, SBC effectively proposes modifications to the existing limited change of law provisions in the XO/SBC M2A that are *not* necessary to conform the agreement to the TRO. Specifically, SBC seeks to add change of law provisions that would allow it to unilaterally withdraw UNEs based on its interpretation of the law, over and above the limited UNE change in law provisions that are set forth in Section 14 of Attachment 6 of the M2A. SBC Issue 1 directly concerns the question of how changes in law would affect SBC's obligations to provide UNEs. SBC Issue 2 concerns transitions related to Issue 1. SBC Issue 19 raises an issue regarding reservation of rights pertaining to changes in law, as shown clearly by SBC's proposed language. SBC's Issue 20 concerns the impact of

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[5] *Coserv Limited Liability Corp. v. Southwestern Bell Telephone Co.*, 350 F.3d 482, 487 (5th Cir. 2003). The court also cites *U.S. West Communications, Inc. v. Minnesota Public Utilities Commission*, 55 F.Supp.2d 968 (D.Minn. 1999) and *MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.*, 298 F.3d 1269 (11th Cir. 2002) in support of its holding.

[6] Letter from Douglas W. Kinkoph, XO Vice President, Regulatory and External Affairs to Kenneth E. Martin, SBC Account Manager, Re: Change in Law Notice under the Approved Interconnection Agreements Between Various XO and SBC Operating Entities, November 26, 2003; *see also* Letters from SBC to Karen Potkul and Doug Kinkoph, dated October 30, 2003 and November 20, 2003 respectively (seeking negotiation pursuant to change in law triggered by the TRO). See supra note 4.

litigation upon the TRO, again a change in law provision. SBC Issue 21 involves the effect of changes in law on performance measures, as demonstrated by its proposed language. By injecting these issues, SBC improperly attempts to raise and negotiate language relating to the decision in *United States Telecommunications. Assoc. v. Federal Communications Comm.*, Case No. 00-0112 (D.C. Cir. 2004) ("*USTA II*"), which would improperly modify existing change of law provisions, and which XO explicitly rejected as beyond the scope of negotiations.[7]

4. The M2A does not contain a general change in law provision. That is why section 3 of the General Terms and Conditions states "Intentionally Left Blank." In sections 18.2 and 18.3 of the M2A, the parties reserved the right to seek clarification and interpretation of the agreement by the Commission, which is precisely what XO has sought do its through its Arbitration Petition in this proceeding. Regarding unbundled elements, SBC expressly waived its right to "assert that it need not provide pursuant to the 'necessary and impair' standard of FTA Section 251(d)(2) a network element set forth in Attachment 6, Unbundled Network Elements, Sections 3-11 and/or its rights with regard to combination of any such network elements that are not already assembled." This waiver is set forth in Section 18.2 of the M2A and was made in conjunction with the provisions of Section 14 of Attachment 6 of the M2A. SBC restated its waiver in Section 14.8 of Attachment 6 of the M2A. The provisions of Section 14 of Attachment 6 of the M2A only override SBC's waiver under limited "change in law" circumstances, specifically: (1) if the FCC or this Commission affirmatively rules that "a certain network element need not be provided under Section 251(c)(3) of the FTA" (in which case the UNE shall remain available but may be subject to a price change upon advance notice)[8]; and (2) if the FCC

[7] *See* Letter from Karen Potkul, XO, to Eddie A. Reed, Jr., SBC dated March 18, 2004. *See* Exhibit A.

[8] See Sections 14.3.1 and 14.4.1

or a court modifies the TELRIC methodology (in which case there is to be negotiation and/or arbitration of any resulting price changes)[9]. Additionally, the M2A provides for adding new elements as ordered by this Commission or the FCC.[10] Finally, Section 18.4 of the General Terms and Conditions of the M2A provides for negotiation and dispute resolution in the event that one of the provisions of the M2A that was based upon a PSC arbitration decision is "invalidated, modified or stayed."

5. SBC's commitment to continue providing UNEs subject to the very limited change in law provisions of the M2A played a key role in SBC's obtaining a favorable recommendation from this Commission in Case No. TO-99-227 regarding its section 271 application to the FCC. There is no basis whatsoever for SBC's efforts to try to alter and dilute these commitments in the guise of post-TRO negotiations and arbitration.

6. SBC's efforts are not supported by the TRO and in fact contravene the FCC's requirements. Nothing in the TRO remotely suggests that the change of law provisions in a current and effective interconnection agreement should be modified or replaced. On the contrary, the TRO specifically found that changes necessary to implement the TRO should be implemented through existing change of law provisions and the Section 252 arbitration process.[11] The FCC expressly declined "the request of several BOCs that we override the section 252 process and unilaterally change all interconnection agreements to avoid any delay associated with the renegotiation of contract provisions."[12] Thus, the FCC rejected ILEC proposals to do exactly what SBC is proposing to do through its proposed language for SBC-Issues 1, 2, 19, 20,

[9] See Sections 14.3.2 and 14.4.2.

[10] See Section 14.5.

[11] *See* TRO at ¶¶ 700-706 (Transition Period).

[12] TRO at ¶ 701.

and 21 and all related language in SBC's proposed amendment which refers to "Lawful UNEs," and/or "declassified" UNEs or facilities.

7. The changes proposed by SBC in SBC-Issues 1, 2, 19, 20, and 21 are not required to make the XO/SBC M2A conform to the TRO. As such, these issues are outside the limited scope of this arbitration and XO respectfully requests that the Commission dismiss these issues and strike all related language in SBC's proposed amendment that refers to "Lawful UNEs," and/or "declassified" UNEs or facilities.

B. SBC's Proposed Contract Language Raise Issues Related to *USTA II* Which Are Not Ripe for Adjudication.

8. As noted above, SBC also raises issues outside of the limited scope of this arbitration by proposing to incorporate language relating to the *USTA* case throughout much of its proposed contract language and again in SBC-Issues 1, 2, 19, 20, and 21.[13] SBC effectively attempts to implement prematurely the *USTA II* decision in this proceeding through this language.[14] However, the D.C. Circuit has not yet issued its mandate in *USTA II*, and it is uncertain whether further stays may extend the date on which *USTA II* will become effective. Moreover, the court decision does not implicate the limited change in law provisions of the M2A.

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[13] *See* for example SBC's Proposed Amendment at Section 2.20 Declassified Facility ("Without limitation, a network element, including a network element referred to as a Lawful UNE under this amended agreement, is Declassified upon or by …. (d) the issuance of the mandate in the D.C. Circuit Court of Appeals' decision, United States Telecom Association v. FCC, Case No. 00-1012 (D.C. Cir. 2004) ("USTA II") …), SBC's Proposed Amendment at Section 1.3.1, and SBC's Proposed Amendment at Section 1.3.1.2 ("Pursuant to USTA II, at least the following elements are also Declassified, as of the issuance of the USTA II mandate: (i) DS1 and DS3 dedicated transport; (ii) DS1 and DS3 loops; (iii) dedicated transport and loop dark fiber; and (iv) Local Switching for Mass Market Customers as defined in Section 3.7.2.

[14] Indeed, as discussed above, much of SBC's proposed ICA language in these issues would attempt to implement any UNE related decisions including *USTA II* that are favorable to SBC immediately upon those decisions' becoming effective, rather than through the change in law procedures in the ICA.

Given these facts, at a minimum, issues and language that SBC has proposed related to the *USTA II* decision are not ripe for adjudication. When and if the D.C. Circuit issues its mandate in the *USTA II* case , the parties (and very likely the Commission) will need to determine if that decision triggers the limited change of law provisions of the M2A. Even if *USTA II* does trigger such change of law provisions when it takes effect, XO and SBC would still need to comply with those provisions. Issues relating to the *USTA II* decision are not properly included in this arbitration.Moreover, as noted above, XO explicitly rejected SBC's attempt to raise or negotiate *USTA II* language during the negotiations process as inappropriate and premature. SBC's improper and premature attempt to arbitrate *USTA II* issues in this proceeding should be rejected and the Commission should dismiss SBC-issues 1, 2, 19, 20 and 21.

Conclusion

For the foregoing reasons, the Commission should dismiss SBC-Issues 1, 2, 19, 20, and 21 and strike all related language in SBC's proposed amendment which refers to "Lawful UNEs," and/or "declassified" UNEs or facilities.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, **Carl J. Lumley,** do hereby certify that I have, on this 11th day of June**,** 2004 caused to be served upon the following individuals, by first class U.S. mail, postage prepaid and e-mail, a copy of the foregoing Petition for Arbitration:

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